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No. 83-797

In the Supreme Court of the United States

OCTOBER TERM, 1983

MEMORIAL HOSPITAL, ET AL., PETITIONERS

v.

MARGARET M. HECKLER,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioners, a group of hospitals, seek Medicare reimbursement for the costs of providing bedside telephones to Medicare patients.

1. The Medicare statute, 42 U.S.C. (& Supp. V) 1395 *et seq.*, provides hospital insurance benefits for the elderly and the disabled. Participating providers of health services (*e.g.*, hospitals and nursing homes) receive reimbursement for the "reasonable cost" of covered services. 42 U.S.C. 1395x(v)(1)(A). The Secretary of Health and Human Services administers the Medicare program and is authorized to "prescribe such regulations as may be necessary" for the program. 42 U.S.C. 1395hh. The statute excludes a number of items from Medicare coverage, including "personal comfort items." 42 U.S.C. 1395y(a)(6). In 1966, shortly after the Medicare statute was enacted, the Secretary promulgated a

regulation specifying patient telephones as an example of an excluded "personal comfort item." 42 C.F.R. 405.310(j).[1]

2. After petitioners' initial claims for patient telephone reimbursement were denied, they appealed to the Provider Reimbursement Review Board (PRRB). See 42 U.S.C. (& Supp. V) 1395*oo*. The PRRB acknowledged petitioners' evidentiary submission purporting to demonstrate the "therapeutic value" of patient telephones, but ruled that it lacked jurisdiction of petitioners' claims because it was bound by the Secretary's regulation prohibiting reimbursement for patient telephones (Pet. App. 3b).[2]

Petitioners sought judicial review in the United States District Court for the Middle District of Florida, pursuant to 42 U.S.C. (Supp. V) 1395*oo*(f)(1). The district court considered various issues raised by petitioners, but declined to consider the patient telephone issue on the merits on the ground that it lacked jurisdiction to do so (Pet. App. 6b-10b). The court cited 42 U.S.C. 1395*oo*(g), which precludes review in cases in which a fiscal intermediary disallows items that are identified as excludable under 42 U.S.C. (& Supp.V) 1395y (Pet. App. 7b-8b).

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[1]42 C.F.R. 405.310 states in pertinent part:

> [N]o payment may be made for any expenses incurred for the following items or services:
>
> • • • • •
>
> (j) Personal comfort items and services (for example a television set, or telephone service, etc.);
>
> • • • • •

[2]When the Secretary did not modify or set aside the PRRB's decision within 60 days of its issuance, it became the Secretary's final decision. 42 U.S.C. (Supp. V) 1395*oo*(f).

The court of appeals affirmed the denial of Medicare payment for patient telephones (Pet. App. 1a-14a).[3] The court of appeals rejected the district court's conclusion that it lacked jurisdiction to decide the patient telephone issue, but upheld on the merits the Secretary's regulation prohibiting patient telephone reimbursement (*id.* at 4a-7a). The court of appeals concluded "that the Secretary's determination is not arbitrary, capricious or an abuse of discretion, is consistent with the Medicare Act and regulations, and is therefore valid and enforceable" (*id.* at 7a).

3. Assuming it had jurisdiction to consider the issue,[4] the court of appeals correctly upheld the patient telephone regulation. The decision below is consistent with the Seventh Circuit's decision rejecting a similar challenge to the regulation, which this Court recently declined to review. *St. Mary of Nazareth Hospital Center* v. *HHS*, 698 F.2d 1337 (7th Cir.), cert. denied, No. 82-2152 (Oct. 3, 1983).[5] See also *St. Francis Hospital, Inc.* v. *Califano*, 479 F. Supp. 761 (D.D.C. 1979) (when a separate nurse-signaling system is available, the Medicare statute and regulations exclude reimbursement for patient telephones).[6]

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[3]The court of appeals also rejected petitioners' claims for reimbursement of the costs of providing mandatory free care under the federal Hill-Burton program and petitioners' challenge to the Secretary's system for calculating reimbursable business telephone costs (Pet. App. 7a-14a). These issues are not raised in the petition.

[4]But see *Highland District Hospital* v. *Secretary of HHS*, 676 F.2d 230, 234-238 (6th Cir. 1982); *Catholic Medical Center* v. *NH-VT Hospitalization Service, Inc.*, 546 F. Supp. 297, 300 (D.N.H. 1982), aff'd on other grounds, 707 F.2d 7 (1st Cir. 1983).

[5]The Court has also declined to review a constitutional challenge to the Secretary's denial of Medicare reimbursement for patient telephones. *Presbyterian Hospital of Dallas* v. *Schweiker*, 454 U.S. 940 (1981).

[6]Another case, in which the district court upheld a challenge to the Secretary's patient telephone regulation, is pending on appeal. *Arlington Hospital* v. *Schweiker*, 547 F. Supp. 670, 677-679 (E.D. Va. 1982), appeal pending, Nos. 83-1439 and 83-1446 (4th Cir.).

Petitioners contend primarily that "[t]he Medicare program requires reimbursement of all therapeutic hospital services regularly provided to patients" and that "regularly provided bedside telephones have proven therapeutic value" (Pet. 6-7). But the Medicare statute does not authorize "reimbursement of all therapeutic hospital services." In fact, it expressly excludes coverage of a variety of services that could be characterized as "therapeutic," including eyeglasses, orthopedic shoes, cosmetic surgery, and custodial care, as well as "personal comfort items." 42 U.S.C. (& Supp. V) 1395y(a).

Petitioners contend (Pet. 7-15) that the Secretary's patient telephone regulation is arbitrary and capricious and constitutes an impermissible irrebuttable presumption. Those contentions are insubstantial. The regulation, promulgated soon after passage of the Medicare statute, reflects a reasonable, common-sense distinction between telephones used primarily by patients to speak with friends and relatives and telephones used for intra-hospital communications and alert systems.[7] The latter are indispensable to the treatment of illness, while personal telephones are not. We do not dispute the self-evident proposition, bolstered by petitioners' extensive "medical" evidence, that by improving patients' morale and helping them to maintain contact with the outside world, personal telephones may aid the healing process. But the same could be said of televisions or radios, a private room, typewriters for letters, and a

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[7]The Secretary has permitted reimbursement for the cost of patient telephones insofar as they are used as part of a medical alert system within a hospital. See *St. Francis Hospital* v. *Califano*, 479 F. Supp. at 764. Petitioners suggest (Pet. 4-5) that their patient telephones are used in part for such a purpose, but they have not attempted to segregate the costs of that usage. Their primary claim in this litigation is that they should receive reimbursement for the costs of telephones used by patients for personal calls.

variety of other services that undoubtedly would be as "therapeutic" for many patients as bedside telephones. Congress expressly authorized the Secretary to draw a line between personal comfort items, which are not reimbursable, and necessary health services, which are reimbursable. See 42 U.S.C. 1395x(v)(1)(A), 1395y(a)(6), 1395hh. The Secretary has acted well within this discretion in concluding that routine patient telephone service is not reimbursable. That conclusion is reasonable, and the court of appeals properly deferred to it. See, *e.g., Schweiker* v. *Gray Panthers*, 453 U.S. 34, 44 (1981); *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450-451 (1978); *Batterton* v. *Francis*, 432 U.S. 416, 425 (1977).

Petitioners contend that the Secretary has not set forth a reasoned justification for the patient telephone regulation and that it therefore must be considered arbitrary, citing *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Automobile Insurance Co.*, No. 82-354 (June 24, 1983). But the record does explain that "[t]he policy of the Medicare program * * * has always been that telephones, like television sets, * * * are for the personal comfort and convenience of patients in their rooms [and] are not integrally related to the provision of patient care * * *" (R. 2225-2226; and see R. 2730-2731, 2741).[8] Contrary to petitioners' suggestion (Pet. 10-11), this policy is not inconsistent with the legislative history of the Medicare statute, which states expressly that personal comfort items "would only be

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[8]The reasons for the patient telephone regulation are not explained in detail in the record because petitioners' claim was dismissed on jurisdictional grounds before the PRRB and the district court and because the rulemaking requirements of the Administrative Procedure Act did not apply to the regulation (see page 6, *infra*).

covered where they contribute meaningfully to the treatment of an illness or injury or the functioning of a malformed body member." S. Rep. 404, Pt. I, 89th Cong., 1st Sess. 48 (1965).[9]

Petitioners assert (Pet. 15-18) that the Secretary's 1966 promulgation of the patient telephone regulation violated the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. 553 (APA). Petitioners did not raise this issue below, and neither the district court nor the court of appeals addressed it. This Court normally declines to consider a question that was neither raised nor decided below. See *United States* v. *Mitchell*, 445 U.S. 535, 546 n.7 (1980); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, petitioners' claim is frivolous. The patient telephone regulation clearly was exempt under the "benefits" exception to the rulemaking requirements of the APA, 5 U.S.C. 553(a)(2). See *Humana of South Carolina, Inc.* v. *Califano*, 590 F.2d 1070, 1082-1084 (D.C. Cir. 1978).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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[9]The legislative history also indicates that the Department of Health, Education, and Welfare (the predecessor to HHS), which played an important role in development of the Medicare legislation, anticipated that bedside telephones would be excluded from coverage. *Medical Care for the Aged: Hearings Before the House Comm. on Ways and Means on H.R. 3920*, 88th Cong., 1st and 2d Sess. 41 (1963).